

File

BEFORE THE
STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Denial of Water)	
Quality Certification in Regard to the)	
Application of Steingraeber Ford, Inc.)	Case No. 3-SE-93-610
to Place Fill in a Wetland, Village of)	
Mukwonago, Waukesha County, Wisconsin)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On November 2, 1993, Steingraeber Ford, Inc., applied to the Department of Natural Resources for water quality certification pursuant to § 401, Clean Water Act, and Chapters NR 299 and NR 103, Wis. Adm. Code. By letter dated May 12, 1994, the Department of Natural Resources denied the application. Steingraeber Ford, Inc., filed a petition for judicial review of the denial. Pursuant to a stipulation and order for dismissal in Waukesha County Circuit Court case no. 94-CV-1602, a contested case hearing pursuant to § 227.44, Stats., was ordered.

Pursuant to due notice, a hearing was held on August 3, 1995, in Waukesha, Wisconsin, Mark J. Kaiser, Administrative Law Judge, presiding.

In accordance with §§ 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Steingraeber Ford, Inc., by

Attorney Thomas L. Smallwood
735 North Water Street
Milwaukee, Wisconsin 53202

Wisconsin Department of Natural Resources, by

Attorney Dan Graff
P. O. Box 7921
Madison, Wisconsin 53707-7921

FINDINGS OF FACT

1. Steingraeber Ford, Inc., (Steingraeber or applicant), is a motor vehicle dealership with facilities located at 1015 South Main Street, Mukwonago, Wisconsin. Steingraeber filed an application dated November 2, 1993, with the Department of Natural Resources (Department) for water quality certification pursuant to § 401, Federal Clean Water Act, and Chapters NR 299 and 103 Wis. Adm. Code.

2. Water quality certification was sought for the filling of approximately 2.5 acres of wetlands. The legal description of the location of the proposed project is the Southeast 1/4, Northwest 1/4 of Section 35, Township 5 North, Range 18 East, Village of Mukwonago, Waukesha County. The area to be filled is immediately adjacent (west) of Steingraeber's dealership. The purpose of the proposed project is to expand Steingraeber's dealership facilities.

3. By letter dated May 16, 1994, the Department denied the application for water quality certification. The grounds for denial were that the applicant "did not provide adequate information to demonstrate that the possible alternatives of expanding the building to the south or relocating [the dealership facilities] are not practicable" and "filling 2.5 acres of wetland at this location would have significant adverse impacts on the wildlife habitat, stormwater filtration and flood storage functions of this wetland complex."

4. The applicant disputes that the area is a wetland. At the hearing, the applicant presented evidence that in the 1950's and early 1960's the area including the site of the proposed project was actively farmed. The fact that the site was actively farmed in and of itself does not prove the area is not a wetland for purposes of Chapters NR 103 and 299, Wis. Adm. Code. The site is designated as a wetland in the United States Department of the Interior Geological Survey (exhibit 16) which was initially prepared in 1960. The site is also delineated a wetland in a Waukesha County wetland inventory map prepared in 1987 which was obtained from the Waukesha County Department of Environmental Resources (exhibit 33). The area presently exhibits wetland characteristics including the presence of hydric soils, the presence of obligate wetland vegetation and the existence of flowing water and other indicators of water, specifically water driftlines and trees with buttressed roots.

5. Alternatively the applicant argues if the site is a wetland it became a wetland as the result of surrounding commercial and residential development which has occurred since the mid 1960's and directed drainage toward the site. As discussed in paragraph four, above, the site was designated a wetland in 1960 which is prior to any development in the area. However, even if the wetland had been artificially created as the result of development, the Department has a policy that it does not matter whether a wetland was naturally or artificially created. This is consistent with Federal practice and precedent on this issue. See: § 404, 33 U.S.C.A. § 1344; Abenaki Nation of Mississiquoi v. Hughes,

805 F.Supp (D. Vt. 1992), affd. 990 F.2d 729 (2nd Cir. 1993) and Leslie Salt Co. v. US, 896 F.2d 354 (9th Cir. 1990).

6. The applicant seeks to fill a portion of the wetland to expand the parking lot for the motor vehicle dealership and construct an addition to its building. The applicant needs the additional space to accommodate its growing business. Additionally, the applicant indicated a low hanging power cable prevents trucks making deliveries to the dealership from being able to turn around in the parking lot. These trucks now have to back out onto County Trunk Highway "ES," which carries a high volume of traffic. Expanding the parking lot would provide additional space for these trucks to turn around.

7. As practicable alternatives to filling a portion of the wetland, the Department suggested the applicant could acquire land south of the present dealership for expansion of its facilities or relocate the dealership to another parcel of land. With respect to the specific problem caused by the low hanging power cable, the cable could be raised or relocated.

8. The applicant estimated the cost of acquiring additional land adjacent to its existing property at between \$80,000 and \$123,000. A cost which the applicant deemed economically prohibitive. The applicant estimated the cost of relocating the dealership at either "several hundreds of thousands of dollars" (exhibit 14) or several million dollars (testimony of Burt Steingraeber at the hearing). Either of these figures are also economically prohibitive for the applicant. Although the cost estimates are vague, either of the alternatives for expanding the dealership are probably economically unfeasible for the applicant. Even if the alternatives were economically feasible, they are much more expensive for the applicant than would be the cost of filling the wetland and developing the land already owned by the applicant.

With respect to the problem trucks have with the low hanging power cable, the applicant provided no reasons why the cable could not be raised or relocated. Filling 2.5 acres of wetland to provide turnaround space for trucks is not a reasonable solution to a problem caused by a low hanging power cable.

9. Expansion of an existing motor vehicle dealership is not a wetland dependant activity.

10. The subject wetland serves an important function in flood control as a storm water detention pond and for filtering run off water prior to the water draining into Upper Phantom Lake. The importance of these wetland functions has increased and will continue to increase as further commercial and residential development occurs in this area of the Village of Mukwonago.

11. The subject wetland contains significant floral diversity. Witnesses for the Department listed ten plant species observed on the parcel. Predominant species included black willow, sandbar willow and quaking aspen. Filling the wetland would destroy the floral diversity function in at least the portion of the wetland which was filled.

12. The subject wetland provides habitat for wildlife including songbirds, amphibians and small mammals. It also provides linkage with other waterways and wetlands in the area for various wildlife. Filling the wetland would destroy the wildlife habitat and linkage functions of the subject wetland for at least the portion of the wetland which was filled.

13. The proposed project will result in significant adverse impacts to the functional values of the affected wetlands and significant adverse impacts to water quality.

14. The area affected is not an area of special natural resource interest within the meaning of § NR 103.04, Wis. Adm. Code.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to hear contested cases and issue necessary orders relating to water quality certification cases pursuant to § 227.43(1)(b), Stats., and § NR 299.05(b), Wis. Adm. Code.

2. Expansion of a motor vehicle dealership is not a wetland dependent activity within the meaning of § NR 103.07(2), Wis. Adm. Code, because a motor vehicle dealership is not of a nature that requires location in or adjacent to surface waters or wetlands to fulfil its basic purpose.

3. The record does not contain sufficient evidence that practicable alternatives exist for the applicant to expand its motor vehicle dealership without filling any portion of the wetland; however, even if no practicable alternatives exist, the proposed project does not meet the requirements of Chapter NR 103, Wis. Adm. Code, because it would result in significant adverse impacts to the functional values of the affected wetlands and significant adverse impacts to water quality.

4. The Division of Hearings and Appeals has the authority pursuant to § NR 299.05, Wis. Adm. Code, to deny, approve or modify a water quality certification if it determines that there is a reasonable assurance that the project will comply with standards enumerated in § NR 299.04, Wis. Adm. Code. The applicant has not shown that the project will comply with these standards.

ORDER

IT IS THEREFORE ORDERED that the decision of the Department to deny the application of Steingraeber Ford, Inc., for water quality certification for the purpose of depositing fill in a wetland is affirmed.

Dated at Madison, Wisconsin on September 6, 1995.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By Mark Kaiser
MARK J. KAISER
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.